Petition

Supreme Court, U.S.
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81-1927

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

EARL FOSTER

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. FOSTER, ESQUIRE

FOSTER, MATHEWS & HILL

222 St. Paul Place

Baltimore, Maryland 21202

Counsel for Petitioner

QUESTION PRESENTED

WHETHER THE SECOND CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT THE PETITIONER WAS NOT ENTITLED TO THE PROTECTIONS OF RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE.

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IN THE

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The Petitioner, Earl Foster, requests that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on February 10, 1982.

OPINION BELOW

On February 10, 1982, the Court of Appeals filed and entered its opinion affirming the conviction of the Petitioner. A copy of the opinion, which is an unpublished opinion, is contained within Appendix A, infra, p. 1a.

JURISDICTION

The order of judgment of the United States Court of Appeals was entered against the Petitioner on February 10, 1982. See Appendix A., p.1a, Infra. This Petition is filed less than 60 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1245(1). No motion for rehearing was filed by the Petitioner.

STATEMENT OF THE CASE

The Petitioner was convicted of conspiracy to import heroin [21 U.S.C. §963 and 960(a)(1)], importation of heroin [21 U.S.C. §952(a), 960 (a)(1) and 18 U.S.C. §2], and possession of heroin with intent to distribute [21 U.S.C. §841(a)(1) and 18 U.S.C. §2]. Petitioner's conviction was on June 26, 1981. Petitioner filed a timely appeal which was filed on June 26, 1981 to the Second Circuit Court of Appeals.

The Petitioner argued his appeal before the Second Circuit Court of Appeals on January 9, 1982. The Second Circuit Court of Appeals render-

ed its opinion on February 10, 1982, which was rendered against the Petitioner.

STATEMENT OF FACTS

The Petitioner was charged and convicted with the offenses charged in the above-mentioned Statement of the Case. Prior to trial, all of the witnesses for the Government testified in a suppression hearing, with the exception of the government's chemist. The trial court heard said testimony and ruled against the Petitioner. At trial, the Petitioner waived his right to a trial by jury and indicated that he wished to proceed by court trial.

During the Petitioner's trial the trial court strongly suggested that the testimony of the witnesses who had testified in the pre-trial suppression hearing be stipulated into the trial record. Petitioner's trial counsel agreed to the procedure suggested by the court, as did the attorney for the government. The only "live" was testimony taken from Mrs. Junkers who gave

identification testimony (she had already given similar testimony in the pre-trial hearing), Agents Payton and Murphy, who gave probable cause testimony as to the arrest of the Petitioner and the search of his room. The remainder of the evidence relied upon by the trial court was the testimony given in the pre-trial suppression hearing, which was stipulated into evidence in Petitioner's trial. The sole exception to the above was the testimony of the government's chemist, who did not give pre-trial testimony but whose testimony was stipulated to by Petitioner's trial counsel at trial.

At no time during the trial proceedings did the trial court personally address the Petitioner and determine if the stipulations, cited above, were entered voluntarily.

REASONS FOR GRANTING THE WRIT

A. The decisions of the trial court and the Second Circuit Court of Appeals were in error and at conflict with

two prior decisions of the courts of appeals of two circuits which have held that when an accused's attorney enters into stipulations of fact and where such stipulations were the only factors causing the accused's conviction the trial court must personally address the accused and make a determination as to whether the accused has voluntarily agreed to the entry of the stipulations.

This case is governed by Rule 11, Federal Rules of Criminal Procedure and the cases which evaluate the spirit of the rule. Rule 11 states in relevant part:

> . . .(c) Advice to Defendant. Before accepting a plea of guilty . . ., the court must address the defendant personally in open court and inform him of, and determine that he understands, the following: (1) the nature of the charge . . . . . (d) Insuring that the plea is voluntary. The Court shall not accept a plea of guilty . . . without first, by address-

> ing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or his attorney.

Rule 11, Federal Rules of Criminal Procedure sets out a mandatory procedure to be followed by a trial court before it accepts a plea of guilty. Rule 11 "requires the trial judge to personally address the defendant as to his knowledge of the charge and the consequences of his guilty plea before the court will accept his plea." United States vs. Terrack, 515 F.2d 558 (9th Cir. 1975). In United States v. Brown, 138 U.S. App. D.C. 398, 428 F.2d 1100 (1970) the appellete court stated at 1102:

> As to federal prosecutions, Rule 11, Fed. R. Crim. P., sets up a prophylactic procedure to insure that the trial judge personally undertakes his responsibility with respect to the waiver of

> constitutional rights in accepting a plea of guilty. He must address the defendant personally to determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.' Prior to 1966 some judges were not addressing the defendant personally, and Rule 11 was amended to require them to do so. And where this part of the Rule is not complied with, the conviction must be reversed. [Emphasis Added].

The general rule through the federal circuits, regarding Rule 11, is that the mandate of Rule 11 is not triggered unless there has first been a plea of guilty. U.S. v. Dorsey, 449 F.2d 1104 (D.C. 1971); U.S. v. Brown, supra. It is also clear that the principles underlying Rule 11 may require an inquiry by the court where the defendant's trial amounts to the equivalent of a guilty plea (de facto guilty plea).

At the time of Petitioner's appeal no Second Circuit Cases had evolved on the issue of a de facto guilty plea, however, other circuits have decided on the issue. In U.S. v. Brown, supra,

defense counsel stipulated that the accused had committed all the acts charged against him. The only issue for the court to determine was the accused's sanity. Before accepting the stipulations, the trial court did not personally address the accused to determine if he had waived his right to a trial on all issues except the issue of sanity. Appellant was convicted and thereupon filed an appeal. On appeal, the conviction was reversed. In reversing, the Appellete court first addressed the issue of whether the mandate of Rule 11 was applicable to the appellant's case. The Appellete court stated at 1102:

> We hold that Rule 11 is inapplicable in this case since a plea of guilty is not involved. We find, however, that the considerations which support the requirements of Rule 11 that the trial judge address the defendant personally are present in the limited circumstances of this case, those limited circumstances being the mental condition of the defendant and the stipulation of counsel admitting all of the acts charged. We

> therefore hold that, in the limited circumstances of this case, the trial judge here should have addressed the defendant personally before accepting the stipulations.

The Brown court next gave its reason for reversing appellant's conviction. The court stated at 1102-04:

> This appeal does not involve a plea of guilty as such. It does involve a stipulation offered by counsel and accepted by the court that appellant committed all the acts charged in the indictment. But for the reservation of the mental issue this was a plea of guilty. The stipulation made out a prima facie case for the government and shifted the burden to the defendant to produce 'some evidence to over-come the presumption of sanity and thus raise the insanity issue. . . . While Rule 11 is not applicable here, no reason appears why the Rule 11 procedure of addressing the defendant personally should not be required. Most, if not all, of the constitutional rights Rule 11 seeks to protect were waived by

> stipulation and the failure of the trial judge to determine that the stipulation was 'an intentional relinquishment or abandonment of a known right' by appellant as distinguished from his counsel left the record subject to attack with motions under 28 U.S.C. §2255. . . .
>
> . . . We hold that where a defendant in a criminal case seeks to waive trial on all issues except insanity, the trial judge should address the defendant personally in determining whether the waiver is made voluntarily with understanding of the consequences of his act.

While the Brown opinion was limited to the facts presented therein, the issue of the defacto guilty plea has surfaced in other circuits. In Julian v. U.S., 236 F.2d 155 (6th Cir. 1956), appellant's counsel stipulated to the facts charged against the appellant. Counsel stated to the court, ". . . we have no defense to offer to this case; that both the district attorney and counsel for defendant are in agreement that the government has established a prima facie case, and that we are unable to upset it . . .

we have no defense to offer to their case . . . we do not even wish to put the defendant on the stand." The appellant was found guilty and thereupon entered an appeal. On appeal the case was reversed. The appellate court found that trial counsel had stipulated to the felonious intent essential to appellant's conviction without having the appellant first questioned by the trial judge as to whether appellant had voluntarily agreed to be tried by the entry of stipulations. In reversing, the appellete court stated at 158:

> We think the judgment of conviction must be reversed. The element of felonious intent essential to conviction could not be stipulated by counsel. The admission on this point was a statement as to defendant's mental attitude and purpose. It constituted the controlling issue in the case and counsel's stipulation thereon could not form the basis of a valid conviction. The conclusion as to the existence or non-existence of criminal intent was to be drawn by the trier of facts. Moreover, the judge

> should have determined whether defendant personally admitted felonious intent. Since he considered the stipulations amounted to a plea of guilty, he should have inquired whether defendant understood the charge and voluntarily acquiesced in the stipulations. Such action would have complied with Rule 11.
>
> For error of the District Court in basing conviction on a stipulation of criminal intent by defendant's attorney and for failing to give defendant the protection of Rule 11. . ., the judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion. [Emphasis Added].

Several other circuits have also considered the Rule 11 - de facto guilty plea issue. See generally, U.S. v. Dorsey, 449 F.2d 1104 (D.C. 1971); U.S. v. Garcia, 450 F.2d 287 (9th Cir. 1971); U.S. v. Terrack, supra. In each of these cases appellant claimed that he should have had a Rule 11 inquiry because of the fact that he had entered a de facto guilty plea through stipula-

tions entered by trial counsel.

In each case, with the exception of Dorsey, the appellete court found that there was sufficient inquiry by the trial court as to the voluntariness of presenting the case by stipulation. The Dorsey court opined that the appellant did not stipulate to the truth of the allegations against him. Each court, however, recognized that in de facto guilty plea situations, some personal inquiry by the court was mandatory.

In U.S. v. Miller, 588 F.2d 1256 (9th Cir. 1979) the appellant stipulated to the facts charged against him. He waived trial by jury and agreed to a court trial. Miller was found guilty and appealed, raising, amoung other issues, that he was not granted the protection of Rule 11. The Ninth Circuit Court of Appeals affirmed the conviction, however, it did agree that some Rule 11 protection should be afforded an appellant who proceeds by way of stipulation. The court, citing Terrack, supra, stated at 1264:

> This does not mean that defendants who wish to proceed to trial through stipulations of fact or waivers in order to preserve an issue for appeal are left unprotected. It is the responsibility of the trial judge when accepting a stipulation or waiver to assure that it is voluntarily made.
>
> Here, Miller stipulated that he knowingly, willfully and defiantly committed the illegal acts . . . for which he was convicted. He also stipulated, among other things, that he understood the range of punishment . . . At the hearing the district judge ascertained from both Miller and his counsel that the matters in the stipulation and waiver were understood and were voluntarily submitted. The inquiry was adequate. [Emphasis Added].

In the instant case the record is clear that no inquiry of any sort was conducted by the trial court as to the issue of whether the Petitioner had voluntarily agreed to the admission of the stipulations. Prior to trial, the trial court had heard all of the evidence that was subsequently stipulated to in the trial. This testi-

mony was taken in the pre-trial suppression hearing and the testimony had been ruled upon by the trial court prior to the stipulations. Therefore, the trial court had already decided upon the issue of the truth and credibility of the witnesses for the government prior to trial. It is clear that Petitioner's trial was, in reality, a de facto guilty plea. Trial counsel admitted as much in his opening statement. Counsel stated at (T-260):

> Of course, we're here for the hearing of basically the government's case, and exploring amongst defense counsel and defendant ways of shortening the procedure that the court now faces; but because we are unable to plead in this case except for the indictment, and without preserving the appellete issues raised in the suppression hearing, the alternative that we've come to is to suggest that we waive a jury, try this case to the court. I think we'll save substantial time from everyone's standpoint, and still preserve the appellete issues, which have been raised at the suppression hearing stage.

Upon the above statement, the Petitioner was addressed by the court as to his waiver of jury trial and thereupn filed a written waiver of trial by jury. No other questioning was fostered by the trial court. Subsequently, defense counsel agreed that the pre-trial testimony of a key government witness (Lea Junkers - photo identification witness) could be admitted into evidence by way of stipulation. Ms. Junkers had given positive identification testimony in the suppression hearing. Her testimony linked the Petitioner to the crimes charged against him. This stipulation procedure, in fact, was initially suggested by the trial court. The hearing judge stated at (T-289):

> Cour we agree that the testimony that I heard the other day would be admissable on the trial and then you could simply add anything additional?

Subsequently, defense counsel stipulated to the entry of the suppression hearing testimony of other key government witnesses who

prior testimony had linked the Petitioner to all of the acts charged against him. The only stipulated testimony that was not heard in a pre-trial setting was the testimony of the government's chemist. Stanley Blasof, the government's chemist, did not testify at trial but his analysis was stipulated to. His analysis indicated that the heroin found was 320 grams and was 86.9% pure, an amount that would indicate an intent to distribute. Therefore, all of the elements needed to convict the defendant of the charges placed against him were stipulated to by defense counsel. No inquiry issued from the court as to the voluntariness of the entry of the stipulations. The entire trial, therefore, was a de facto guilty plea.

In its opinion, the Second Circuit based its decision on two points. Firstly, the appellete court ruled that mental impairment was not at issue thus the Brown, supra case

did not control. Secondly, the appellete court reasoned that since Petitioner did not stipulate as to the truth of the stipulations all matters were at issue at trial.

Petitioner avers that Brown was limited as to the sanity question, however, other circuits have expanded the Brown case by implication. See generally, Julian, Miller, Terrack, Garcia, supra. Petitioner also avers that it was not necessary for him to stipulate as to the truth of the stipulations because the truth and credibility of the stipulated testimony had previously been decided by the trial court in the suppression hearing. If the court would have decided to disbelieve the stipulated testimony, it would have, by implication, reversed its ruling incident to the suppression testimony. Therefore, the failure to stipulate to the truth of the testimony was academic.

Finally, it should be noted that the Second Circuit opined that applying Rule 11 principles to the facts of this case would

require "a court examination of the defendant with respect to virtually every stipulation in a criminal case." The short answer to this statement is that if due process requires such an inquiry it outweighs any argument of time consumption. Additionally, Rule 11 considerations would only require an inquiry as to the stipulations that would tend to convict a criminal defendant. Petitioner's trial amounted to a de facto guilty plea and, accordingly, the trial court should have conducted an inquiry as to the voluntariness of the entry of the stipulations.

CONCLUSION

For the reasons cited, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

_____

JAMES L. FOSTER

Counsel for Petitioner

Appendix

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Order of the Second Circuit Court of Appeals.. A.1

UNITED STATES OF AMERICA,

Appellee,

V. 81-1288

EARL FOSTER,

Defendant-Appellant

O R D E R

Earl Foster appeals from a June 26, 1981, judgment of the District Court for the Eastern District of New York(Charles P. Sifton, Judge), convicting him after a court trial of conspiracy to import heroin, importation of heroin, and possession of heroin with intent to distribute. 21 U.S.C. §§ 841(a)(1), 952(a), 960(a)(1), 963. Drug Enforcement Administration agents became aware of the arrest of "S. Robinson" for possession of heroin in Bangkok, Thailand. They ascertained that a man calling himself "Carter" had made the travel arrangements for Robinson as well

as for "L. Cheatham," who would be arriving in New York. When agents found heroin on Cheatham, she agreed to cooperate and participate in a controlled delivery. Cheatham was then ecsorted from the airport to a taxi cab by defendant Foster, who fit the description given by the travel agent of the man who identified himself as Carter. Foster was arrested, and agents found evidence in an attache case in his hotel room linking him to Cheatham's and Robinson's drug trafficking activity abroad.

After the District Court denied Foster's suppression motions and the Government declined to permit him to enter a conditional guilty plea, Foster waived his right to a jury trial. The trial judge fully explained his right to a jury trial and questioned him regarding whether his waiver was knowing and voluntary. At the trial, the travel agent identified Foster as the purchaser of the tickets used by Cheatham and Robinson. The evidence seized from Foster that linked

him to Cheatham and Robinson was also introduced. Counsel agreed that the Court could consider the testimony of the travel agent (and other witnesses) at the suppression hearing and stipulated to the admission of certain physical evidence (hotel records, passports, customs declarations, copies of travel itineraries and invoices, the heroin, and a bicycle tube that contained heroin) and also that a DEA chemist would testify that the seized substance contained heroin. Defendant was convicted.

On appeal, Foster's sole complaint is that his trial was the equivalent of a de facto guilty plea because his defense counsel had agreed to stipulations that he claims had the effect of tying him to the conspiracy, which was the disputed issue in the case. Therefore, he contends, by analogy to Fed. R. Crim. P. 11, the district judge should have personally addressed the defendant to determine whether Foster's agreement to the stipulations was voluntary. The District

Court made no inquiry of the defendant regarding the stipulations.

Rule 11 is, of course, inapplicable since a plea of guilty or nolo contendere is not involved in this case. However, the D.C. Circuit Court of Appeals has applied the considerations underlying the rule in the limited circumstances of a defendant of questionable mental condition stipulating to all acts charged in an indictment (other than the defendant's sanity), United States v. Brown, 428 F.2d 1100(D.C. Cir. 1979), and the Eighth Circuit Court of Appeals has required the trial court to question the defendant as to the voluntariness of a stipulation that is the"functional equivalent of a guilty plea" such that "nothing remains but to give judgmant and determine the punishment," Cox v. Hutto, 589 F. 2d 394, 396 (8th Cir. 1979) (per curiam) (quoting Boykin v. Alabama, 395 U.S. 238, 242 (1969)). See also United States v. Miller, 588 F.2d 1256, 1264 (9th Cir. 1978), cert. denied, 440 U.S. 947

(1979). But whatever the merits of these decisions, it is clear that they have no applicability to this case. Defendant alleges no mental impairment, and he has not stipulated to all the conduct charged against him. By stipulating to the to the admission of physical evidence and to what various witnesses had testified or would testify, the defendant did not admit any of the acts with which he is charged. He never stipulated to the truth of any of the testimony and in fact vigorously contested the inferences that could be drawn from the evidence that he stipulated was admissible. The trial court remained free to disbelieve any of the stipulated testimony and to draw its own inferences as to whether the defendant had participated in the drug-trafficking scheme. See United States v. Strother, 578 F. 2d 396, 404 (D.C. Cir. 1978) (Brown does not apply where defendant has not stipulated to truth of allegations against him). The strength of the case against Foster derives not from the

stipulations but from the facts developed in the contested evidence. See United States v. Dorsey, 449 F.2d 1104, 1108 (D.C. Cir. 1971). To extend the principles of Rule 11 to this case would require a court examination of the defendant with respect to virtually every stipulation in a criminal case. Neither the Rule nor the policies underlying it require such a practice. See United States v. Terrack, 515 F.2d 558, 561 n. 3 (9th Cir. 1975).

Judgment affirmed. The mandate shall issue forthwith.

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Circuit Judges.